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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	:	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	:	

COMMENTS OF LIBERTY CABLE COMPANY, INC.

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SUMMARY

Liberty Cable Company, Inc. ("Liberty") is a satellite master antenna television ("SMATV") operator serving approximately 7,000 subscribers in the New York City metropolitan area. Liberty competes head to head with the local franchised cable company, Time Warner, Inc. ("Time Warner"). Time Warner has a 99+% market share in New York City and Liberty has less than 1%.

The fundamental premise of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") is that <u>all</u> multichannel video programming distributors (MVPDs) should have an equal opportunity to obtain <u>all</u> available programming without interference by entrenched and dominant franchised cable operators. As Congress also wants the Commission to implement the 1992 Cable Act with the minimum regulatory oversight necessary, the Commission should adopt clear, "bright line" standards of general application that simply and succinctly define illegal conduct and, where appropriate, are articulated as presumptions of illegality with a heavy burden of proof on the party seeking to overcome the presumption.

Liberty has suffered both explicit and implicit facilities-based discrimination by cable programmers, i.e. the imposition by programmers of higher prices and more onerous terms on Liberty than are offered to franchised cable operators with the same number of subscribers solely because Liberty distributes its programming to subscribers using a different technology than a franchised cable operator. Since anti-competitive discrimination has been caused by franchised cable operators exerting pressure on <u>all</u> programmers

regardless of whether the programmer is owned by a cable operator, the Commission should ban anti-competitive practices by all programmers and not just those owned by cable operators. Exclusive agreements with an existing franchised cable operator are implicit facilities-based discrimination since programmers have never entered into exclusive agreements with any SMATV operator or other alternative technology MVPD and the purpose of the agreements is to prevent market entry by an alternative technology competitor.

Regulations implementing Sections 12 and 19 of the 1992 Cable Act should provide that any express or implicit facilities-based discrimination in the price, availability or other term or condition of programming is presumptively illegal. Specifically, the rules should provide that direct or indirect facilities-based discrimination by programmers is presumed to be a violation of Section 628(b). A presumption of illegality is also the most effective means of implementing Section 616(a)(3) which prohibits cable operators from interfering with the ability of programmers to sell to all customers on a fair and equal basis. To overcome the presumption of illegality, the proponent of facilities-based discrimination should carry the burden of proving by clear and convincing evidence that the facilities-based discrimination promotes "effective competition," as that term is used in the rate regulation section, Section 623(l)(1), in all affected markets.

Exclusive programming agreements should be presumptively illegal. The presumption should apply to all exclusive arrangements to which a cable operation is a party or which benefit a cable operator. The prohibition on exclusive arrangements pursuant Section 628(b) should apply to any satellite cable programming vendor in which a cable operator has an attributable interest without regard to the geographic area in which the cable operator owns cable systems. The burden of proof to overcome the presumption of illegality should be on the proponent of the exclusive contract. The proponent should have to show by clear and convincing evidence that the exclusive arrangement promotes effective competition as that term is defined in Section 623(1)(1) in the affected area within the time frame of the exclusive agreement. If the affected area already has effective competition, then the proponent must show that the arrangement will ensure effective competition continues for the life of the arrangement. No injury needs to be shown. An inquiry into actual injury will lead to the kind of micro-management Congress directed the Commission to avoid.

Enforcement procedures should be quick and simple. The Commission should limit its adjudicatory role in enforcing Sections 12 and 19 to determining whether there has been compliance with the statute and regulations. Relief should simply be declaratory rulings that particular conduct does or does not comply with law, and if it does not, directing the offending party to comply. There should be real penalties and other financial disincentives to discourage violations, with monetary penalties paid to the U.S. Treasury. The Commission should also rule that an aggrieved MVPD or programmer has a federal private cause of action in court to pursue a claim for damages for the law violation.

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I. Introduction

A. Background

1. These comments are submitted by Liberty Cable Company, Inc. ("Liberty") in response to the Notice of Proposed Rulemaking ("NPRM") in this matter adopted by the Federal Communications Commission (the "Commission") on December 10, 1992 and released December 24, 1992. Liberty is a satellite master antenna television ("SMATV") operator in New York City currently serving approximately 7,000 subscribers at dozens of sites in the New York City metropolitan area. Liberty has built the largest 18 ghz network in the United States and is a pioneer in the use of 18 ghz microwave technology to redistribute its signal. Liberty will also be among the first video programmers in the U.S. to test "video dialtone" technology beginning in 1993.

2. To the best of Liberty's knowledge, it is the only SMATV company in the country that is successfully overbuilding and competing head to head with a local franchised cable company. Liberty's franchised competitor in New York is Time Warner, Inc. ("Time Warner") which does business in Manhattan through Manhattan Cable Television and Paragon Cable Manhattan and in the outer boroughs through B-Q Cable, QUICS and Staten Island Cable. Time Warner has a 99+% market share in New York City. Liberty has less than 1%.

3. Time Warner is also a vertically integrated cable operator/programmer with an ownership interest in a number of programming services such as Home Box Office ("HBO"), Court TV and

Channel 1. Liberty carries HBO but pays a higher rate for the service than is paid by franchised cable operators with the same number of subscribers as Liberty. Liberty does not carry Court TV or Channel 1 because Time Warner has refused to sell those services to Liberty.

B. Congressional Premise and Purpose

4. The fundamental premise of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") is that all multichannel video programming distributors (MVPDs)[1] should have an equal opportunity to obtain all available programming without interference by entrenched and dominant franchised cable operators. H.R. Rep. No. 628, 102d Cong., 2d Sess. (the "House Report"), at p. 110-11; S. Rep. No. 92, 102d Cong. 1st Sess. (the "Senate Report") at pp. 24-29, reprinted in 1992 U.S. Code Cong. & Admin. News 1133.

5. The overriding purpose of the 1992 Cable Act is to create and encourage competition in the delivery of cable television service. House Report at p. 27; Senate Report at p. 18. Congress clearly expects a variety of "alternative technologies" to provide that competition including SMATV, MMDS, DBS, home satellite dishes and other technologies not yet implemented, such as Local

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[1] As an SMATV operator, Liberty is an MVPD. Liberty hereby incorporates the comments it filed on this subject in the must carry/retransmission consent rulemaking proceeding, MM Docket No. 92-259, FCC 92-499 (released November 19, 1992).

Multichannel Distribution Service.[2] H.R. Rep. No. 102-862, 102d Cong. 2d Sess. (1992) (the "Conference Report") at p. 93 (Congress intends that the Commission's regulations implementing Section 19 "shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.")

6. Congress recognized that alternative technologies have not yet offered meaningful competition to franchised cable operators—in large measure because existing franchised cable operators have exercised their monopoly control over programmers to thwart competition. Franchised cable operators have forced some programmers to refuse to deal with non-cable MVPDs. They have also forced the programmers who will deal with non-cable MVPDs to impose higher prices and discriminatory conditions thus making it difficult, if not impossible, for non-cable MVPDs to compete in the marketplace. House Report at pp. 41-43; Senate Report at pp. 24-29. The Commission has extensively documented this anti-competitive conduct. See Report in MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) (the "1990 Cable Report") at ¶¶ 112-130 and Appendix G, Tables IX to XII. Liberty has first hand experience with this anti-competitive conduct. Congress enacted Sections 12 and 19 to outlaw this anti-competitive conduct.

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2 On December 10, 1992, by Notice of Proposed Rulemaking, Tentative Decision and Order on Reconsideration, in CC Docket 92-297, FCC 92-538, the Commission announced its rulemaking for the introduction of Local Multipoint Distribution Service to promote cable television service utilizing the 28 ghz band.

7. The 1992 Cable Act directs the Commission to rely on marketplace forces to the maximum extent feasible to eliminate anti-competitive programming practices. See Section 2(b)(2) of the 1992 Cable Act. Congress also wants the Commission to implement the 1992 Cable Act with the minimum regulatory oversight necessary to "rein in" the existing monopoly power of entrenched franchised cable operators. Senate Report at p. 18.

C. Micro-Management Of Program Distribution

8. The NPRM raises many detailed and intricate questions that suggest the Commission is considering extensive regulation of the minutiae of cable television program distribution. This approach would be a mistake—given the dozens of programmers, thousands of MVPDs and millions of subscribers involved. Detailed government regulation of these relationships would be a Herculean, if not impossible, task.

9. The Commission's implementation of Sections 12 and 19 should therefore avoid, wherever possible, micro-managing the relationships between programmers and MVPDs. Instead, the Commission should adopt clear, "bright line" standards of general application that simply and succinctly define illegal conduct. Where appropriate, these standards should be articulated as presumptions of illegality with a heavy burden of proof on the party seeking to overcome the presumption. The goal of this "bright line" regulation should be to foster marketplace driven relationships between programmers and all MVPDs without undue or

improper influence by the dominant franchised cable operators. The Commission should also promulgate rules that will allow aggrieved parties to pursue damage claims in court. Liberty hereinafter offers some suggestions for such rules. This kind of approach presents the most efficient use of the Commission's resources. It is also consistent with the Congressional objective of implementing the 1992 Cable Act with the minimum government oversight necessary to "rein in" the franchised cable operator's market power.

10. If, after this rulemaking, the Commission is adjudicating cable programming issues on a regular basis with voluminous pleadings and protracted discovery, then the Commission has failed in its mission. Commission intervention in cable programming matters should be the exception, rather than the rule.

D. Anti-Competitive Conduct

1. Discrimination By All Programmers

11. Both Congress and the Commission recognize that anti-competitive discrimination has been caused by franchised cable operators exerting pressure on all programmers regardless of whether the programmer is owned by a cable operator. 1990 Cable Report at ¶ 127 ("[M]ost cable operators have the ability to deny or unfairly place conditions on a programming service's access to the cable communities they serve, and the record in this proceeding indicates that some have done so."). House Report at pp. 42-43; Senate Report at pp. 24-29. Liberty has experienced this kind of programming discrimination first hand and can attest that such

discrimination has substantially hindered Liberty's ability to compete with the local franchised cable operator. Accordingly, the Commission should ban anti-competitive practices by all programmers and not just those owned by cable operators.

2. Explicit Facilities-Based Discrimination

12. Like SMATV operators nationwide,[3] Liberty has been the victim of "facilities-based discrimination" by cable programmers, i.e. the imposition by programmers of higher prices and more onerous terms and conditions on Liberty than are offered to franchised cable operators with the same number of subscribers solely because Liberty distributes its programming to subscribers using a different technology than a franchised cable operator. For example, Liberty typically pays for its programming on the "SMATV rate card"—a rate structure based on the number of subscribers and the fact that Liberty is an SMATV operator. A franchised cable operator with the same number of subscribers as Liberty generally pays less for the same programming. There is absolutely no legitimate reason why Liberty should pay more for the same programming. As an SMATV operator, Liberty is generally treated as a second class citizen by most programmers, and does not receive

[3] See e.g. Appendix G, Tables IX to XII in 1990 Cable Report which show, inter alia, some SMATV programming rates are twice as high as "cable rates" for the same service nationwide.

the same level of services as are provided to franchised cable operators, e.g. marketing support.[4]

13. Both Liberty and franchised cable operators use a satellite receiving antenna to receive the programmer's satellite signal. Both Liberty and franchised cable operators use coaxial cable to deliver that signal to their subscribers. The only functional difference between Liberty and a franchised cable operator is that Liberty's distribution network crosses public streets using 18 ghz microwave transmissions and not coaxial cable.[5] And Liberty serves only the residents of multifamily buildings. There is no conceivable reason why these characteristics should cause programmers to incur higher costs for providing service to Liberty.[6]

3. <u>Implicit Facilities-Based Discrimination</u>

14. Some facilities-based discrimination has been explicit, such as the "SMATV rate card." But facilities-based

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[4] Marketing support generally consists of discounts for new subscribers during incentive sales periods, credits against fees to be spent on advertising and other monetary concessions that have a direct and financial value to Liberty for encouraging the purchase of the programming service.

[5] Liberty also operates without a franchise. However, this legal status should not affect the programmer's costs or Liberty's prices.

[6] Liberty recognizes that a programmer may incur higher transaction costs on a per subscriber basis in serving smaller systems or individual home satellite dishes. These higher costs may justify price differentials based solely on the number of subscribers.

discrimination can also be indirect, implicit and just as onerous as explicit, facilities-based discrimination.

15. For example, when Liberty first entered the New York City marketplace, some programmers, e.g. Showtime, sought to enforce an "overbuild policy."[7] Under the "overbuild policy," the programmer would not sell programming to Liberty until sixty days after Liberty had overbuilt the existing franchised cable operator in a building. This meant that even after Liberty had installed its system in a building, Liberty would be perceived by residents for two months as a "second class" service because it could not offer the same programming as the existing franchised cable operator.

16. Needless to say, the programmers' "overbuild policy" created an insurmountable barrier for market entry by Liberty. The "overbuild policy" was not explicitly facilities-based discrimination because it ostensibly applied only to "overbuilders" without regard to the technology employed by the overbuilder. However, the original vendor of the programming service was, in every case, the franchised cable operator and the "overbuilder" was, in every case, an SMATV operator. Thus the "overbuild policy" was an implicit and indirect facilities-based discrimination which crippled alternative technology competition just as effectively as explicit facilities-based discrimination.[8]

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7 1990 Cable Report at ¶ 114 which describes the "overbuild policy" as a "time delay requirement."

8 The "overbuild policy" is only one example of implicit, facilities-based discrimination. The Commission is well aware of (continued...)

4. Exclusive Agreements As Implicit <u>Facilities-Based Discrimination</u>

17. In the same vein, exclusive agreements with an existing franchised cable operator are the result of implicit facilities-based discrimination. Programmers have never entered into exclusive agreements with any SMATV operator or other alternative technology MVPD. The purpose and effect of exclusive agreements is to prevent market entry by an alternative technology competitor. This is just as much a burden on Liberty as paying higher "SMATV rates" for programming.

18. The franchised cable companies attempt to justify exclusive program contracts as a "legitimate" industry practice designed to encourage the carriage of new programs. But experience tells a different story. Time Warner still asserts an exclusive hold over long established programming services such as Madison Square Garden. And even new services, like Court TV, are offered without restriction to every system in the country except in Manhattan. This is monopoly, not marketing.

19. The effect of facilities-based discrimination, both express and implicit, is to significantly hinder the ability of Liberty to provide its service in New York City. Liberty's SMATV/

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[8](...continued)
the many different burden's a programmer can impose on an alternative technology MVPD but not on a cable operator without an express reference to the technology used by the MVPD. <u>See</u> NPRM at ¶¶ 31 and 32 (time-delay requirements, renegotiation requirements, subdistribution agreements only with cable operators) and 1990 Cable Report at ¶ 114 and Appendix G, Table IX. Some programmers have discriminated on the basis of whether an MVPD has a "franchise." This is explicit facilities-based discrimination because, by definition, only "cable operators" have a franchise.

18 ghz method of signal distribution is much less expensive than the Time Warner method of placing cables in every street and hallway of New York City. Liberty passes its cost savings along to consumers with lower prices—in some cases as much as 50% less than Time Warner. Liberty attributes its success in entering the New York City market to its ability to offer lower prices than Time Warner.[9]

20. However, Liberty is unable to lower prices further and thus realize its full potential of a market share larger than 1% because it pays prices that are artificially high due to facilities-based discrimination. This injury—though difficult to quantify—is very real and tangible. The true losers are the consumers in New York City who are unable to get the full benefits of truly competitive pricing for programming.

5. Liberty's Experience With Exclusive Agreements

21. Some programmers have also refused to deal with Liberty solely because they have an exclusive arrangement with Time Warner in New York City. Time Warner has an equity interest in some of these programmers. Time Warner also had exclusive contracts with unaffiliated programmers. These exclusive contracts have hurt Liberty's ability to compete with Time Warner.

22. For example, the recently introduced Court TV is owned in part by Time Warner. Court TV is available to SMATV

[9] Time Warner, in response, has had to lower some of its prices.

operators nationwide with the sole exception of New York City.[10] Liberty is unable to obtain Court TV because Time Warner "negotiated" the exclusive right to distribute Court TV in New York City. Yet the founders of Court TV would like to sell the programming service to Liberty.[11]

23. This is the classic case of an entrenched franchised cable operator exercising both its monopoly control over the marketplace and its ownership control over the programmer to frustrate competition from alternative technologies. The effect of this anti-competitive conduct is subtle yet pernicious. Given the broad array of programming offered by Liberty and its small but growing subscriber base, it is difficult, if not impossible, to identify each specific instance where a subscriber or building has decided to not take Liberty's service because Liberty does not offer Court TV. Indeed, such a decision is typically made without Liberty ever knowing it. However, the unavailability of Court TV, like the "overbuild policy," clearly creates the impression in the minds of consumers that Liberty is a "second class" service, an impression Time Warner is quick to create and exploit. Time Warner is constantly and publicly attacking Liberty for not having Court TV. See annexed Exhibit B.

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[10] This policy is not facilities-based discrimination but rather discrimination directed against a particular and identified competitor—Liberty.

[11] See Affidavit of Peter Price in Turner Broadcasting v. FCC, Docket No. 92-2247 (the "Price Affidavit"), a copy of which is annexed as Exhibit A.

II. Suggested Rules

A. Facilities-Based Discrimination Should Be Presumptively Illegal

24. The regulations implementing Sections 12 and 19 should provide that any express or implicit facilities-based discrimination in the price, availability or other term or condition of programming is presumptively illegal. Specifically, the rules should provide that direct or indirect facilities-based discrimination by programmers is presumed to be a violation of Section 628(b).[12] A presumption of illegality is also the most effective means of implementing Section 616(a)(3) which prohibits cable operators from interfering with the ability of programmers to "compete fairly", i.e. sell to all customers on a fair and equal basis. These presumptions are based on the findings of both Congress and the Commission that franchised cable operators have improperly pressured programmers to discriminate against alternative technology competitors thus contributing to a lack of effective competition in the marketplace. See Senate Report at pp. 24-29; House Report at pp. 41-43; see also 1990 Cable Report at ¶¶ 112-128. The presumption is therefore rational and valid. See United Scenic Artists Local 829 v. N.L.R.B., 762 F.2d 1027, 1034 (D.C. Cir. 1985). There is no need for the Commission to review

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[12] The NPRM at ¶ 8 has questioned whether "satellite cable" services should be treated differently from "satellite broadcast" services under Section 628(b). The answer is no. "Satellite cable" and "satellite broadcast" programming vendors both sell programming carried by MVPDs and both kinds of vendors have engaged in the anti-competitive conduct that led to the adoption of Sections 12 and 19. See Senate Report at pp. 24-25.

this issue each time a complaint is filed. Cf. Coleman v. Thompson, 111 S.Ct. 2546, 2558 (1991) ("The presumption...is designed to avoid the costs of excessive inquiry where a per se rule will achieve the correct result in almost all cases.")

25. To overcome the presumption of illegality, the proponent of facilities-based discrimination should carry the burden of proving by clear and convincing evidence that the facilities-based discrimination promotes "effective competition," as that term is used in the rate regulation section, Section 623(l)(1), in all affected markets.[13] "Effective competition" sets a clear "bright line" benchmark of legitimacy that is easily understood, readily applied and furthers the fundamental policy of the 1992 Cable Act. See Senate Report at p. 28 ("[Congress] believes that [program] exclusivity can be a legitimate business strategy where there is effective competition. Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market.")

26. Congress enacted the 1992 Cable Act on the premise that government intervention is necessary in the cable television marketplace because that marketplace needs—but currently lacks—effective competition. Remedial government action is needed to correct the skewed marketplace caused by the cable operators' anti-competitive control over programmers. Once "effective competition"

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[13] The relevant geographic market should be all areas served by all MVPDs adversely affected by the illegal programming practice.

arrives, programmers will presumably set their prices[14], availability and other terms and conditions in response to healthy marketplace forces and not the coercion of monopoly cable operators.

27. Thus, it should be incumbent on any proponent of a presumptively invalid programming practice, e.g. facilities-based discrimination, to show that the practice actually operates to hasten the arrival of "effective competition" in the affected area. If the affected area already has "effective competition," then the proponent of discrimination must show that the practice will ensure the continuation of "effective competition."

B. Exclusive Programming Agreements Should Be Presumptively Illegal

1. In General

28. As with facilities-based discrimination, any and all exclusive programming arrangements, *de jure* and *de facto*, should be presumed illegal.[15] Again, this is a clear, "bright line" standard that is readily understood, easily applied and already well established by Congress and the Commission. Indeed, exclusivity is one of the unfair methods of competition that

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14 *Compare*, Section 623(a)(2).

15 Exclusive programming arrangements should be defined as any and all programming agreements or other arrangements, express or implicit, that prevent any MVPD in the affected area from having the opportunity to acquire the programming for any period of time. As with facilities-based discrimination, the relevant geographic market should be all areas served by all MVPDs adversely affected by the illegal programming practice.

Congress intended to ban when it adopted Section 628(b). Conference Report at p. 92. A presumption of illegality for exclusive programming agreements would be the most effective means of prohibiting any cable operator or other MVPD from coercing such agreements from a programmer. See Section 616(a)(2).

29. The presumption should apply to any and all exclusive contracts or other arrangements to which a "cable operator" is a party or which benefit the cable operator. There is no indication in the language or legislative history of Sections 616 and 628(b) that Congress intended to limit the application of those sections to exclusive arrangements only by vertically integrated cable operators/programmers.[16]

30. The prohibition on exclusive arrangements pursuant to Section 628(b) should apply to any "satellite cable programming vendor in which a cable operator has an attributable interest" without regard to the geographic area in which the "cable operator" owns cable systems. Liberty pays discriminatory and higher prices for a number of programming services that are owned by cable operators, e.g. Showtime (owned by Viacom) and Sports Channel (owned by Cablevision), even though the cable operator/owner does not operate cable systems in New York City. This discrimination is part of a larger pattern of anti-competitive conduct by vertically integrated cable operator/programmers directed against alternative

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[16] Congress was quite specific when it wanted to be, in describing vertically integrated cable operators/programmers. See e.g. Section 628(c)(2)(D). Congress did not apply the vertical integration qualifier to the term "cable operator" in Section 628(b).

technology competitors. See Senate Report at pp. 24-26, House Report at p. 41, and 1990 Cable Report at ¶¶ 127-28. Congress intended to outlaw this conduct. See Section 628(c)(2)(C).

31. The burden of proof to overcome the presumption of illegality should be on the proponent of the exclusive contract. The proponent should have to show by clear and convincing evidence that the exclusive arrangement promotes the arrival of "effective competition" as that term is defined, Section 623(l)(1), in the affected area within the time frame of the exclusive arrangement. If the affected area already has "effective competition," then the proponent of the exclusive agreement must show that the arrangement will ensure "effective competition" continues for the life of the arrangement.

32. The regulations implementing the "public interest determination" provision of Section 628(c)(4) should also set "effective competition" as the standard to be met before an exclusive arrangement serves the "public interest." Thus, the proponent of an exclusive arrangement must show that the public interest is served by the exclusive arrangement because exclusivity promotes the arrival or continuation of "effective competition" within the affected area during the term of the exclusivity by (1) encouraging the "development of competition in local and national multichannel video programming distribution market", Section 628(c)(4)(A), (2) promoting "competition from multichannel video programming distribution technologies other than cable", Section 628(c)(4)(B), (3) attracting "capital investment in the production and distribution of new satellite cable programming", Section

628(c)(4)(C), and (4) promoting "diversity of programming in the multichannel video programming distribution market", Section 628(c)(4)(D).

2. An Example of How the Rule Will Operate

33. In the case of Liberty's inability to obtain Court TV, the presumption should be that the refusal of Court TV to sell the programming service to Liberty is a violation of Section 628(b) by Court TV, because it is a "satellite cable programming in which a cable operator has an attributable interest" and by Time Warner because it is a "cable operator" operating in the affected market of New York City. If Court TV were not affiliated with Time Warner, the arrangement would still be presumptively illegal pursuant to Section 628(b) because Time Warner is a beneficiary of it. The arrangement should also be illegal pursuant to the regulations adopted to implement Section 616 because it is presumptively the result of conduct by Time Warner to restrain Court TV from dealing fairly with Liberty.

34. Either Court TV or Time Warner could petition the Commission to overcome the presumption of illegality. However, they would have to show by clear and convincing evidence that the refusal to sell Court TV to Liberty actually promotes the arrival of "effective competition" in New York City within the time frame of the arrangement. In making that showing, Time Warner and/or Court TV would have to address the factors set forth in Section 628(c)(4)(A) through (D) showing that each of those factors operate to bring "effective competition" to New York City. Only after such

a showing, could the Commission declare the Time Warner/Court TV exclusive programming arrangement valid and legal.[17]

C. <u>**Injury Need Not Be Shown By Victims**</u>

35. The Commission has asked for comments on the level of actual injury that needs to be shown by a victim of anti-competitive programming practices. <u>See</u> NPRM at ¶ 10. Liberty respectfully suggests that no such injury needs to be shown and that an inquiry into "actual injury" will lead the Commission into the very kind of micro-management Congress directed it to avoid. Moreover, it may be impossible for a victim of illegal programming practices to develop meaningful hard evidence of its injury. The victim's injury is a reduced market share due to lack of programming and excessive programming costs. The reduced market share is caused by the decisions of thousands of anonymous consumers who chose not to purchase the victim's service because of high prices or unavailable programming. These decisions are invariably made in private and without the victim's knowledge. All the victim knows is that it is not doing as well as it knows it

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[17] Time Warner contends that its exclusive agreement with Court TV is necessary to promote the introduction of a new programming service in New York City. This claim is downright silly given the fact that Liberty has less than 1% of the New York City market. There has never been any proof that withholding programming from competitors—and thus subscribers—actually enhances the viability of a new programming service. Common sense dictates otherwise. The founders of Court TV believe otherwise. <u>See</u> Price Affidavit at ¶ 7 in Exhibit A. Time Warner should have to show that its exclusive right to distribute Court TV in New York City actually promotes "effective competition" in New York City even though Court TV is withheld from competitors.

can—a subjective impression that is arguably caused by reasons unrelated to anti-competitive programming practices.

36. For example, Liberty is actually aware of only a few specific instances where customers have refused to take Liberty's service because of facilities-based discrimination or programming exclusivity. If the Commission were to require Liberty to show that its meager 1% market share in New York City is specifically and directly caused by facilities-based discrimination or exclusivity, then the Commission, Liberty, Time Warner and a multitude of programmers will spend months examining the minutiae of Liberty's business with Time Warner and the programmers claiming each subscriber "lost" by Liberty was for reasons unrelated to program cost and availability. This unnecessarily diverts the Commission's time and attention from the real issue at hand—the exercise of monopoly power by Time Warner over Court TV and other programmers to lock out competition in New York City. Accordingly, the Commission should not confine itself to examining only the <u>effect</u> of the anti-competitive conduct but the <u>purpose</u> as well. Indeed, Section 628(b) speaks of "the purpose <u>or</u> effect" of unfair programming practices.

37. The anti-competitive <u>purpose</u> of discriminatory and exclusionary programming practices can and should be inferred from the conduct itself—without any need to address the "effect" in particular cases. It was the existence of these programming practices and their general anti-competitive effect that led Congress to enact Sections 12 and 19 in the first place. Accordingly, the Commission can and should presume that the